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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

TAMMY WOLFE,

Plaintiff,

v.

CLARK COUNTY SCHOOL DISTRICT;
and DOES Individuals I through X;
inclusive,

Defendants.

Civil Action No. 2:22-cv-1709-JAD-BNW

PLAINTIFF’S RESPONSE IN OPPOSITION TO
DEFENDANT’S MOTION TO DISMISS

Plaintiff, Tammy Wolfe (“Plaintiff” or “Ms. Wolfe”), by and through her undersigned counsel, hereby respectfully submits her Response in Opposition to the Motion to Dismiss [Dkt. No. 5] (the “Motion”) filed by Defendant, Clark County School District (“Defendant” or “CCSD”). In support thereof, Ms. Wolfe states as follows:

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This case arises as a result of the retaliatory treatment Ms. Wolfe endured while employed as a Special Education Teacher at Duane D. Keller Middle School (“Keller”), a constituent institution of CCSD. More specifically, as detailed in her Complaint, Ms. Wolfe alleges that CCSD retaliated against her via multiple reprimands and unfounded scrutiny regarding her classroom behavior after Ms. Wolfe repeatedly advocated on behalf of Keller’s

1 disabled students in response to CCSD’s failure to follow the federal regulations regarding
2 the development, review, and revision of the disabled students’ Individualized Educational
3 Programs (“IEPs”). [Dkt. No. 1, ¶¶ 13–16, 25–41, 47–49, & 56–58.]

4 As a result of CCSD’s retaliatory conduct, Ms. Wolfe initiated this lawsuit on October
5 10, 2022, asserting two claims for retaliation against CCSD in violation of the Americans with
6 Disabilities Act (42 U.S.C. §§ 12101, *et seq.*) (“ADA”) and Section 504 of the Rehabilitation
7 Act of 1974 (“Section 504”). CCSD has moved to dismiss both claims for failure to state a
8 claim upon which relief can be granted, asserting that Ms. Wolfe has failed to state a *prima*
9 *facie* case for retaliation under either statute.

10 CCSD’s arguments are unavailing. Because Ms. Wolfe has plead allegations
11 sufficient to establish a *prima facie* case for retaliation under both the ADA and Section 504,
12 CCSD’s Motion should be denied. Moreover, to the extent this Court finds that the Complaint
13 is deficient, Ms. Wolfe respectfully requests that this Court enter an Order granting her leave
14 to amend the Complaint.

15 II. STANDARD OF REVIEW

16 Pursuant to FEDERAL RULE OF CIVIL PROCEDURE 12(b)(6), a defendant may move the
17 Court for the dismissal of a complaint based upon its “failure to state a claim upon which
18 relief can be granted.” A complaint must allege “enough facts to state a claim for relief that
19 is plausible on its face.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). “This is
20 not to say that the factual allegations must themselves be plausible; after all, they are assumed
21 to be true. It is just to say that relief must follow from the facts alleged.” *Bryson v. Gonzales*,
22 534 F.3d 1282, 1286 (10th Cir. 2008). The plaintiff’s facts need only show that there is “more
23 than a sheer possibility that a defendant has acted unlawfully.” *Ashcroft v. Iqbal*, 556 U.S.
24 662, 678 (2009) (To be plausible, a claim must plead factual allegations sufficient to allow
25 “the court to draw a reasonable inference that the defendant is liable for the misconduct”
26 above a “speculative level.”).

27 In analyzing whether the complaint efficiently states a claim, a court must accept all
28 well-pleaded facts as true and view them in the light most favorable to the plaintiff. *Walker*

1 *v. Fred Meyer, Inc.*, 953 F.3d 1082, 1086 (9th Cir. 2020). To survive a motion to dismiss for
 2 failure to state a claim, a complaint must satisfy the notice pleading standard of Federal Rule
 3 8(a)(2). *See Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1103 (9th Cir. 2008).
 4 Under Rule 8(a)(2), a complaint must contain “a short and plain statement of
 5 the claim showing that the pleader is entitled to relief.” FED. R. CIV. P. 8(a)(2). “In
 6 determining the propriety of a Rule 12(b)(6) dismissal, a court may not look beyond the
 7 complaint to a plaintiff’s moving papers, such as a memorandum in opposition to a
 8 defendant’s motion to dismiss.” *Schneider v. Cal. Dep’t of Corr.*, 151 F.3d 1194, 1197 n. 1
 9 (9th Cir.1998) (emphasis omitted).

10 III. ARGUMENT AND AUTHORITIES

11 Because Ms. Wolfe has plead allegations sufficient to establish a *prima facie* case for
 12 retaliation under both the ADA and Section 504, the Court should deny the Motion.
 13 Moreover, to the extent this Court finds the Complaint is deficient, Ms. Wolfe respectfully
 14 requests that this Court enter an Order granting her leave to amend the Complaint.

15 A. MS. WOLFE HAS SUFFICIENTLY STATED A *PRIMA FACIE* CASE FOR RETALIATION 16 UNDER THE ADA AND SECTION 504.

17 Ms. Wolfe has brought her retaliation claims under the ADA and Section 504. The
 18 ADA’s anti-retaliation statute provides that:

19 No person shall discriminate against any individual because such
 20 individual has opposed any act or practice made unlawful by this
 21 chapter or because such individual made a charge, testified, assisted,
 or participated in any manner in an investigation, proceeding, or
 hearing under this chapter.

22 42 U.S.C. § 12203. Similarly, Section 504 incorporates the anti-retaliation provision of Title
 23 VI of the Civil Rights Act of 1964, 29 U.S.C. § 729a(2), which provides that:

24 No recipient or other person shall intimidate, threaten, coerce, or
 25 discriminate against any individual for the purpose of interfering with
 26 any right or privilege secured by section 601 of the [Civil Rights Act]
 27 or this part, or because he has made a complaint, testified, assisted, or
 participated in any manner in an investigation, proceeding or hearing
 under this part.

28 ///

1 34 C.F.R. § 100.7(e). Because the two statutes are functionally equivalent, courts analyzing
2 claims under either statute utilize the same framework under which a plaintiff can establish a
3 *prima facie* case for retaliation by showing “(1) he or she engaged in a protected activity; (2)
4 suffered an adverse employment action; and (3) there was a causal link between the two.”
5 *Pardi v. Kaiser Found. Hosps.*, 389 F.3d 840, 849 (9th Cir. 2004).

6 CCSD concedes that Ms. Wolfe has alleged sufficient facts to show that she engaged
7 in protected activity and that she has standing to assert her claims. [Dkt. No. 5, pp. 5–6.]
8 CCSD asserts, however, that Ms. Wolfe has failed to allege facts sufficient to establish
9 elements two (2) and three (3) of a *prima facie* case for retaliation: namely, that she suffered
10 an adverse employment action and there is a causal connection between the protected activity
11 and the adverse actions.

12 With respect to the second element, CCSD further concedes that Ms. Wolfe’s
13 allegations regarding the October 15, 2021, meeting in which Keller Assistant Principal,
14 Rachelle Duggins-Tetlow, reprimanded Ms. Wolfe for emailing officials with CCSD’s
15 regional staff regarding several special education students who were not being adequately
16 served are sufficient to establish a *prima facie* case for retaliation. [Dkt. No. 5, p. 6.] CCSD
17 seemingly takes issue with Ms. Wolfe’s allegations that CCSD again reprimanded Ms. Wolfe
18 for continuing to advocate regarding her ongoing, unaddressed concerns in March 2022 and
19 that she was subject to unnecessary scrutiny regarding her classroom behavior in February
20 2022. [Dkt. No. 1, ¶¶ 36–37.] CCSD asserts that these allegations “lack the specificity
21 required” to show that CCSD’s actions constituted adverse employment actions.

22 This argument is unpersuasive given the Ninth Circuit’s interpretation of an adverse
23 employment action as “any action ‘reasonably likely to deter employees from engaging in
24 protected activity.’” *Pardi v. Kaiser Found. Hosps.*, 389 F.3d 840, 850 (9th Cir. 2004)
25 (quoting *Ray v. Henderson*, 217 F.3d 1234, 1243 (9th Cir.2000)). Here, Ms. Wolfe has
26 alleged that, as a result of her engagement in a protected activity, she suffered adverse
27 employment actions, including receiving reprimands in October 2021, and March 2022, and
28 being unnecessarily referred to regional staff because of unfounded concerns about her

1 classroom management. [Dkt. No. 1, ¶¶ 33–38.] Unnecessary scrutiny of Ms. Wolfe’s job
 2 performance after she complained of CCSD’s failure to adequately serve its disabled students
 3 is conduct that is reasonably likely to deter employees from engaging in protected activity.
 4 This is further evidenced by the fact that, in February 2022, Ms. Wolfe had to seek urgent
 5 medical care as a result of the ongoing stress and difficulty arising from CCSD personnel in
 6 the performance of her job. [Dkt. No. 1, ¶ 36.] Ultimately, the harassment she suffered by
 7 CCSD forced her to resign from her position. [Dkt. No. 1, ¶ 41.] Finally, CCSD’s call for
 8 Ms. Wolfe to attach her annual teacher evaluation to the Complaint in support of her claims
 9 is asking this Court to evaluate the veracity of Ms. Wolfe’s allegations. This is improper.
 10 Instead, the Court must accept all of Ms. Wolfe’s well-pleaded facts as true and view them in
 11 the light most favorable to her. *Walker*, 953 F.3d 1086. Thus, CCSD’s argument should be
 12 rejected.

13 Considering CCSD’s concession that Ms. Wolfe has alleged sufficient facts to show
 14 she suffered an adverse employment action on at least one occasion, the broad interpretation
 15 of the phrase “adverse employment action,” and the Court’s obligation to view the allegations
 16 in the Complaint in the light most favorable to her, Ms. Wolfe asserts that she has plead
 17 sufficient facts to establish the second element for a *prima facie* case of retaliation.

18 So, too, with respect to the third element of a *prima facie* case for retaliation: namely,
 19 that Ms. Wolfe has alleged sufficient facts to establish a causal connection between her
 20 complaints regarding CCSD procedures and the adverse employment actions to which CCSD
 21 subjected her. The Ninth Circuit has adopted a “but-for” causation standard to retaliation
 22 claims brought pursuant to the ADA. *T.B. ex rel. Brenneise v. San Diego Unified Sch. Dist.*,
 23 806 F.3d 451, 473 (9th Cir. 2015). “But-for causation is often indicated by the words ‘by
 24 reason of’ and ‘because of.’” *Skinner v. Newmont Mining Corp.*, No. 218CV01787KJDVCF,
 25 2019 WL 3554705, at *3 (D. Nev. Aug. 2, 2019) (citing *UMG Recordings, Inc. v. Shelter*
 26 *Capital Partners LLC*, 718 F.3d 1006, 1017 n.7 (9th Cir. 2013).” Although a long temporal
 27 gap between the protected activity and adverse employment action may make it more difficult
 28 to show causation, circumstantial evidence of a pattern of antagonism following a protected

1 activity can also give rise to the inference of a causal link.” *Id.* (citing *Porter v. Cal. Dep’t of*
2 *Corr.*, 419 F.3d 885, 895 (9th Cir. 2005).

3 Here, while Ms. Wolfe did not expressly use the phrase “but-for” in the Complaint,
4 the allegations regarding causation support the inference that Ms. Wolfe would not have been
5 the subject of any adverse employment actions but-for her complaints regarding IEP
6 documentation starting in October 2021 and continuing to her eventual resignation.
7 Specifically, Ms. Wolfe alleged that “[a]s a direct result of Ms. Wolfe’s engagement in the
8 protected activity, Ms. Wolfe suffered adverse employment action, including, but not limited
9 to, receiving reprimands in October 2021, and March 2022, and for her complaints to CCSD
10 regional personnel regarding IEP documentation and receiving unfounded complaints and
11 scrutiny from CCSD administrators regarding her classroom management after making said
12 complaints.” [Dkt. No. 1, ¶¶ 49 & 58.]

13 In arguing that Ms. Wolfe has not alleged sufficient allegations supporting causation,
14 CCSD, again, improperly asks this Court to evaluate the veracity of Ms. Wolfe’s allegations
15 and to construe any inferences against Ms. Wolfe. Specifically, CCSD argues, “Here,
16 Plaintiff’s administrators clearly had no issue with the activity in which Plaintiff engaged, as
17 evidenced by Plaintiff’s allegation that Mrs. Duggins-Tetlow direct Plaintiff to communicate
18 her concerns directly to Keller administration and/or Mr. Tawresey.” [Dkt. No. 5, p. 8.] This
19 argument, however, asks this Court to ignore the other obvious inference, construed in favor
20 of Ms. Wolfe, that the fact that CCSD met with Ms. Wolfe three days after she engaged in
21 protective activity in order to reprimand her was directly related to the subject matter of the
22 complaint, not the audience to whom the complaint was made. CCSD further urges this Court
23 to find that the October 15, 2021, meeting was not a reprimand at all, in spite of Ms. Wolfe’s
24 clear allegations to the contrary. Again, evaluating the veracity of Ms. Wolfe’s allegations is
25 not the proper standard of review at this stage of the proceedings. This Court should decline
26 CCSD’s invitation to do so and deny the Motion.

27 Finally, CCSD argues that Ms. Wolfe failed to timely assert her claims because, per
28 CCSD’s reasoning, the only conceivable adverse employment action was the October 15,

2021, meeting in which she was reprimanded for engaging in protected activity, and Ms. Wolfe did not file her EEOC Charge of Discrimination until June 24, 2022. But CCSD ignores the allegations concerning CCSD's conduct in February 2022 and March 2022, which ultimately forced Ms. Wolfe to resign in May 2022. In cases of ongoing retaliation or harassment, like Ms. Wolfe's, a claimant can file an EEOC claim within 180 days of the last incident of harassment. 42 U.S.C.A. § 2000e-5(e)(1). Here, Ms. Wolfe alleges that she was reprimanded for her ongoing complaints in March 2022 and, ultimately, was compelled to resign in May 2022. [Dkt. No. 1, ¶¶ 38, 41.] This is within 180 days of the filing of her EEOC Charge of Discrimination. [Dkt. No. 1, ¶ 42.] As such, Ms. Wolfe's claims are timely. The Court should also reject CCSD's argument on this point and deny the Motion.

B. PLAINTIFF REQUESTS LEAVE TO AMEND THE COMPLAINT IF THE COURT IS INCLINED TO GRANT ANY PART OF THE MOTION.

In the event this Court is inclined to grant any portion of the Motion, Ms. Wolfe requests leave to amend her Complaint. Leave to amend "shall be freely given when justice so requires." Fed. R. Civ. Pro. 15(a). This presumption in favor of leave to amend aligns with the Rule's underlying purpose of advancing decisions on the merits, rather than pleadings or technicalities. *See Conley v. Gibson*, 355 U.S. 41, 48 (1957). "Dismissal with prejudice and without leave to amend is not appropriate unless it is clear on *de novo* review that the complaint could not be saved by amendment." *Eminence Cap., LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003); *see also* Fed. R. Civ. P. 15(a).

Thus, leave to amend should not be denied in the absence of strong evidence of "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed undue prejudice to the opposing party by virtue of allowance of the amendment, [or] futility of amendment." *Foman v. Davis*, 371 U.S. 178, 182 (1962); *Sonoma Cnty. Ass'n of Retired Emps. v. Sonoma Cnty.*, 708 F.3d 1109, 1117 (9th Cir. 2013). "The consideration of prejudice to the opposing party carries the greatest weight." *Sonoma Cnty. Ass'n of Retired Emps.*, 708 F.3d at 1117 (quotation and citation omitted). No prejudice would come to Defendant in this case if leave to amend were granted,

1 and no other factor applies. Accordingly, in the event this Court finds either of Ms. Wolfe's
2 causes of action insufficient, leave to amend or an opportunity to seek leave to amend is
3 respectfully requested.

4 **IV. CONCLUSION**

5 For the reasons set forth above, the Court should deny Defendant's Motion to Dismiss
6 in its entirety, or, alternatively, allow Ms. Wolfe to amend her Complaint to remedy any
7 deficiencies therein as identified by this Court.

8 DATED this 19th day of December, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing ***PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS*** with the Clerk of the Court for the United States District Court by using the Court's CM/ECF system on the 19th day of December, 2022.

☒ I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

☐ I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third-party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants: N/A

/s/ Sandra Herbstreit
an employee of The Bach Law Firm, LLC